

## PROGRAM REPORT

### Water Quality Certification Program, §401 of the Clean Water Act

The Central Valley Region has vast wetland resources in its rivers, streams and vernal pools. The function of Water Quality Certification (WQC) is to protect these wetlands by ensuring that waste discharged to these waters meets state water quality standards. The WQC program regulates dredge and fill activity that results in any discharge to Waters of the U.S. These projects require a Federal Permit under §404 of the Clean Water Act (CWA). Pursuant to §401 of the CWA, any applicant for a federal license or permit for any activity that may result in any discharge into Waters of the U.S. shall provide the federal permitting agency (i.e., Army Corps of Engineers [Corps, ACOE]) with a certification from the respective State. The WQC Program started as a relatively narrow response to the requirements of CWA §401. It has evolved into being the State's de facto wetland protection regulation program, without, however, formal recognition of these responsibilities or commensurate funding.

Typical projects for which WQC is requested include new subdivisions, bridges, roads, pipeline construction; levee reconstruction; wetland habitat improvement; pier installation; boat harbor dredging; gravel mining; flood control excavation; and minor stream crossings. The Central Valley Region has received 395 new applications for water quality certifications over the past year.

Regional Board staff is required to notify an applicant within 30 days as to whether or not an application is considered complete or incomplete. A receipt letter is sent to the applicant that indicates whether or not the application is complete, and provides instructions depending on the status of the application. This may also include a request for additional fees in accordance the new fee schedule. If an application is determined to be complete, we have 60 days to issue or deny certification. These time requirements keep the limited WQC staff very busy.

New fees for WQCs went into effect in October 2002. Prior to October 2002 an applicant submitted \$500 for a standard certification and \$1,000 for a conditional WQC. Now an application fee of \$2,150 per acre plus \$500 is required for review of the application and issuance of a WQC. Wetland fill activities are charged up to a maximum of \$40,000. For dredging it is \$0.08 per cubic yards plus \$500 up to a maximum of \$40,000. For FY 2003-04, the Central Valley Region collected \$365,000 (through 4/14/2004) in fees but only received \$195,000 for staffing. This funding supported 1.7 PYs, which were split among our three offices. Receipts are expected to further increase in FY 2004-05 with further revision of the fee schedule. However, no increase in the WQC budget is expected.

Funding for the program is insufficient for the workload and does not allow staff to complete basic regulatory functions such as inspections, mitigation monitoring and enforcement. It is both federal policy and state policy that there be "no net loss" of wetlands. With current staffing we are unable to ensure that these policies are implemented.

Further impacts to the program came in January 2001 when the US Supreme Court issued its decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC). This decision limited the application of the Clean Water Act as it applies to non-"isolated" waters. The Clean Water Act no longer covers discharges of waste to vernal pools, which may be isolated from waters of the US. By narrowing the water and wetland areas under federal regulation, the decision limits the authority of the Corps, and the State and Regional Water Boards under federal law. The decision does not affect the State and Regional Water Board's authorities under state law to regulate discharges to any waters of the state including isolated, non-navigable waters.

Compensatory mitigation is required for most WQCs, which is usually enforced by the Corps. However with the SWANCC decision, isolated wetlands will now be regulated by the State. A weakness in the "isolated wetlands" program is compensatory mitigation. Several Regions currently require mitigation to meet the "no net loss" policy. However, Central Valley staff currently follows the ACOE mitigation ratio which requires replacement of lost wetlands at a greater than one to one ratio. However, we have not been able to generally follow up to ensure that replacement wetlands have actually been created.

In summary, the WQC program is a minimally funded effort to ensure compliance with the State's water quality laws and protect wetlands. A significant amount of money is collected from applicants but not returned to the Central Valley Region for regulatory work. The SWANCC decision has added to the Region's WQC workload. No budget augmentations are planned for FY 04-05, even though the proposed FY 04-05 fee schedule will further increase fees.